

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554
OCT 1993

MM-Docket No. 93-260

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Marion, Indiana,
in the Indianapolis-Bloomington,
Indiana, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: September 21, 1993; Released: October 7, 1993

Comment Date: November 4, 1993

Reply Comment Date: November 19, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed June 9, 1993, by Marion T.V., Inc., licensee of television station WMCC-TV, Channel 23 (Independent), Marion, Indiana to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Indianapolis-Bloomington, Indiana, television market to "Indianapolis-Bloomington-Marion, Indiana." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See

CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.⁴ The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. The petitioner initially notes that WMCC-TV was not operational in 1972 when the Commission adopted the Section 76.51 market listings (based upon Arbitron's market designations for 1970), and hence Marion, Indiana was not included in the Indianapolis-Bloomington market. It maintains, however, that WMCC-TV is today part of the Indianapolis market as designated by both Arbitron and Nielsen. In this regard, the petitioner states that the Indianapolis-Bloomington ADI is comprised of ten commercial television stations -- five licensed to Indianapolis (WHMB-Channel 40; WISH-Channel 8; WRTV-Channel 6; WTHR-Channel 13 and WXIN-Channel 59); three to

¹ The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

² See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. See *Report and Order* in MM Docket No. 92-259, *supra*, hereinafter referred to as the "Must-Carry Order."

Bloomington (WCLJ-Channel 42; WIIB-Channel 63 and WTTV-Channel 4); one to Kokomo (WTTV-Channel 29); and one to Marion (WMCC-Channel 23).

6. The petitioner asserts that WMCC-TV's Grade A contour covers Indianapolis and its Grade B signal covers all of Marion County, where Indianapolis is located. In comparing the coverage to the two Indianapolis UHF stations and the two Bloomington UHF stations, the petitioner states that WMCC-TV covers 47 percent of the ADI while the others cover from 41.1 to 48.3 percent of the ADI. Moreover, it states that WMCC-TV's Grade B signal substantially overlaps those of the other market stations and, because of transmitter locations roughly equivalent in distance from Indianapolis, the station's Grade B contour services essentially the same areas as the other cited UHF stations.

7. In addition, the petitioner states that it directly competes with other market-area stations for programming and advertisers. It states that WMCC-TV must compete with the other stations for the acquisition of syndicated programming, paying the same Indianapolis-Bloomington market rate due to the station's inclusion in the subject ADI. The petitioner also asserts that WMCC-TV's local advertisers are located in the Indianapolis ADI, with a significant percentage of such advertisers located in Indianapolis itself. The petitioner also notes that local television listings include WMCC-TV's program schedule. Despite this competitive environment, the petitioner states that the only two commercial stations not included in the market as listed in Section 76.51 are itself and Kokomo, and that the latter is a satellite of Station WTTV-Channel 4, in Bloomington. Thus, the petitioner contends, Station WMCC-TV is the only station "forced to operate under different rules than those applicable to all of its competitors in the ADI."

8. The essence of the petitioner's claim is that although WMCC-TV is competitive with the other stations listed, *supra*, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, the petitioner states that while WMCC-TV is entitled to carriage on Indianapolis-Bloomington ADI cable systems under the Commission's new must-carry rules,⁵ because Marion is not a designated community in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.⁶ As a result, the petitioner states, it has already received notifications by several ADI area cable systems that they will not carry the station due to increased copyright liability attendant to the carriage of a "distant signal."⁷

9. The petitioner claims that although WMCC-TV has lost approximately one million dollars annually during each year of operation, it has kept the station on the air in the hope that the alleged "inequities" in the signal carriage

and copyright laws are corrected to allow the station to be treated comparably to that of its market competitors. By amending Section 76.51 as requested, the petitioner maintains that an even playing field for all market-area stations will result without requiring WMCC-TV alone to pay prohibitively expensive copyright fees to assert its must-carry rights.

DISCUSSION

10. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that Station WMCC-TV and stations licensed to communities in the Indianapolis-Bloomington television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

11. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

12. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before November 4, 1993, and reply comments on or before November 19, 1993. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

⁵ See Section 76.56(b) of the Commission's Rules.

⁶ Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Marion as a designated community in this market list results in WMCC-TV's classification as a "distant signal" for market-area cable systems more than 35 miles from Marion.

⁷ Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993,

that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, *supra*, at 2973-74.

Initial Regulatory Flexibility Analysis

13. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

14. For additional information on this proceeding, contact James A. Hudgens, Office of Plans and Policy, Federal Communications Commission (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
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